Hor Chin Ser & Anor v Villa Genting Development Sdn Bhd (in liquidation) & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)-795–05 OF 2015
ABANG ISKANDAR, ZAMANI A RAHIM AND ZALEHA YUSOF JJCA
29 NOVEMBER 2016

Companies and Corporations — Liquidation — Liquidators — First respondent's liquidator obtained vesting order of properties — Liquidator sold properties to second, third and fourth respondents — Appellants claimed ownership of properties and applied to set aside vesting order — Whether first respondent owner of properties at the time when liquidator applied for vesting order — Whether liquidator right in obtaining vesting order — Whether liquidator had right to sell properties — Whether appellants' failure to lodge private caveat affect their rights on properties — Companies Act 1965 ss 233 & 236 — National Land Code s 340

The first respondent, a company in liquidation was the developer of a housing project known as 'Amber Court' whereas Samaworld (M) Sdn Bhd was the proprietor of the land involved in the project. The appellants alleged that they were the purchasers and owners of 15 apartment units ('the properties') in the said housing project. Dispute arose when the liquidator of the first respondent ('the liquidator') conducted a verification exercise to ascertain ownership of the properties and later on, obtained an order dated 9 December 2011 ('the vesting order') under s 233 of the Companies Act 1965 ('the Act'), to vest in the liquidator the said properties. Subsequently, the liquidator sold the said properties to the second, third and fourth respondents. In response to the action by the liquidator, the appellants commenced an action at the High Court and applied for the vesting order and the transfer of the properties to be set aside; the liquidator to effect the transfer of the properties in favour of the appellants; and the appellants be given leave to commence action for damages against the first respondent or the liquidator. The trial court dismissed the appellants' application, hence the present appeals. The main issue for decision was whether the properties were the properties of the first respondent at the time when the liquidator applied for the vesting order.

Held, allowing the appeals with costs and setting aside the decisions of the High Court:

(1) Based on the preamble of the sale and purchase agreement entered between the first respondent and the original purchaser of the properties, the first respondent was called 'the vendor' who had the right 'to develop

and sell the apartment land'. The fact that the first respondent was merely a developer and was not the owner of the properties was admitted by first respondent in its affidavit affirmed on 18 October 2013. The first respondent, being the developer of the properties, its interest in the properties was purely monetary. The liquidator was therefore wrong in applying and obtaining the vesting order to vest the properties which the first respondent did not own (see paras 13, 15 & 24).

(2) Section 236(2)(c) of the Act only allows the liquidator to sell the properties of the company. The properties herein did not belong to the first respondent hence it was quite irresistible for the court to conclude that the transfer was done through void instrument which attracts the application of s 340 of the National Land Code ('the Code'). The second, third and fourth respondents clearly could not enjoy the benefit under the proviso to s 340(3) of the Code. Once the court was satisfied that the transfer of the title in the properties to the second, third and fourth respondents, being immediate purchasers, arose from a void instrument, 'it automatically follows that they are liable to be set aside'. Further, the land tittle of the properties had an endorsement that the first respondent was merely a 'bare trustee', consequently, the liquidator was simply not entitled to apply for an obtain the vesting order under s 233 of the Act or to sell the properties to the second, third and fourth respondents under s 236 of the Act (see paras 26, 34 & 38).

(3) The fact that there was failure on the part of the appellants to lodge a caveat did not defeat their rights, titles and interests in respect of the properties (see para 40).

[Bahasa Malaysia summary

Responden pertama, sebuah syarikat dalam likuidasi, adalah pemaju projek perumahan yang dikenali sebagai 'Amber Court' manakala Samaworld (M) Sdn Bhd adalah pemilik tanah yang terlibat dalam projek tersebut. Perayu-perayu mendakwa bahawa mereka pembeli-pembeli dan pemilik-pemilik 15 unit apartment ('hartanah-hartanah') dalam projek perumahan tersebut. Pertikaian timbul apabila pelikuidasi responden pertama ('pelikuidasi') mengambil langkah pengesahan untuk mengenal pasti milikan hartanah-hartanah dan kemudian mendapat perintah bertarikh 9 Disember 2011 ('perintah letak hak') di bawah s 233 Akta Syarikat 1965 ('Akta'), untuk meletak hak pelikuidasi hartanah-hartanah tersebut. Seterusnya, pelikuidasi menjual hartanah-hartanah tersebut kepada responden kedua, ketiga dan keempat. Membalas tindakan pelikuidasi, perayu-perayu memulakan tindakan di Mahkamah Tinggi dan memohon agar perintah letak hak dan pindah milik hartanah-hartanah tersebut diketepikan; pelikuidasi menguatkuasakan pindah milik hartanah-hartanah tersebut untuk perayu-perayu; dan perayu-perayu diberi kebenaran memulakan tindakan bagi ganti rugi terhadap responden pertama atau pelikuidasi. Mahkamah bicara

menolak permohonan perayu-perayu. Oleh itu, rayuan ini. Isu utama untuk diputuskan adalah sama ada hartanah-hartanah tersebut adalah hartanah-hartanah responden pertama semasa pelikuidasi memohon perintah letak hak.

Diputuskan, membenarkan rayuan-rayuan dengan kos dan mengetepikan keputusan Mahkamah Tinggi:

(1) Berdasarkan mukadimah perjanjian jual beli yang dimasuki oleh responden pertama dan pembeli asal hartanah-hartanah, responden pertama dipanggil 'penjual' yang mempunyai hak untuk 'memajukan dan menjual tanah apartment'. Fakta bahawa responden pertama sekadar pemaju dan bukan pemilik hartanah-hartanah diakui oleh responden pertama dalam affidavitnya yang disahkan pada 18 Oktober 2013. Responden pertama, sebagai pemaju hartanah-hartanah, mempunyai kepentingan kewangan semata-mata. Oleh itu, pelikuidasi terkhilaf dalam mengguna pakai dan mendapatkan perintah letak hak untuk meletak hak hartanah-hartanah yang tidak dimiliki oleh responden pertama (lihat perenggan 13, 15 & 24).

(2) Seksyen 236(2)(c) hanya membenarkan pelikuidasi menjual hartanah-hartanah tersebut kepada syarikat. Hartanah-hartanah ini bukan milik responden pertama. Oleh itu sukar untuk mahkamah memutuskan bahawa pindah milik dilakukan melalui instrumen yang terbatal yang membangkitkan pemakaian s 340 Kanun Tanah Negara ('Kanun'). Responden kedua, ketiga dan keempat jelas tidak boleh menikmati faedah proviso s 340(3) Kanun. Apabila mahkamah telah berpuas hati bahawa pindah milik hak milik hartanah-hartanah kepada responden kedua, ketiga dan keempat, sebagai pembeli langsung, timbul daripada instrumen yang terbatal, 'secara automatiknya, kesemuanya boleh diketepikan'. Selanjutnya, hak milik tanah hartanah-hartanah tersebut mempunyai endorsmen bahawa responden pertama sekadar 'bare trustee'. Oleh itu, pelikuidasi tidak berhak untuk sewenang-wenangnya memohon bagi mendapatkan perintah letak hak di bawah s 233 Akta atau menjual hartanah-hartanah kepada responden kedua, ketiga dan keempat di bawah s 236 Akta (lihat perenggan 26, 34 & 38).

(3) Fakta bahawa perayu-perayu gagal memasukkan kaveat tidak melupuskan hak-hak, hakmilik-hakmilik dan kepentingannya dalam hartanah-hartanah (lihat perenggan 40).]

Notes

For a case on liquidators, see 3(1) *Mallal's Digest* (5th Ed, 2015) para 535.

Cases referred to

Angkutera Sdn Bhd v Jurimba Sdn Bhd & Anor [2016] 5 MLJ 242, CA (folld)
Equity Funds of Australia (in Liq), Re (1976-1977) 2 ACLR 238, SC (refd)
Jashin Scaffolding (M) Sdn Bhd v Chew Ai Eng Sdn Bhd; OCBC Bank (Malaysia) Bhd (applicant) [2004] MLJU 225; [2004] 6 CLJ 497, HC (refd)
Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768, FC (refd)
Lee Teng Siong v Lee Geok Thye Holdings Sdn Bhd [2004] 5 MLJ 13, HC (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (folld)
Tan Ong Ban v Teoh Kim Heng [2016] 3 MLJ 23; [2016 3 CLJ 193, FC (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1, FC (refd)
Young v Bristol Aeroplane Company, Limited [1944] KB 718, CA (refd)

Legislation referred to

Companies Act 1961 (New South Wales) [AU] s 279
Companies Act 1965 s 233, 233(1), (2), 236(2), (2)(c), 279
Courts of Judicature Act 1964 ss 23, 24
National Lade Code s 340, 340(3)

Appeal from: Company Winding-Up No MT3–28–199 of 2013 (High Court, Shah Alam)

Lau Kee Sern (Shook Lin & Bok) for the appellants.
Harpal Singh Grewal (Sumathi, Sabrina Richards and Reny Rao with him) (Hakem Arabi & Assoc) for the first respondent.
Jasvinjit Singh (Jasvinjit Singh & Co) for the second, third and fourth respondents.

Zaleha Yusof JCA:

[1] All these three appeals before us involve similar facts and issues. They are against the decision of the learned judicial commissioner ('JC') of the High Court at Shah Alam who on 10 April 2015 dismissed the appellants' application for, inter alia, the following order:

(a) that the court order dated 9 December 2011 be set aside and/or varied in such manner or to such extent that all the 15 properties named in the applications ('the properties') shall forthwith be excluded therefrom;

(b) the purported sale and transfer of the properties by the liquidator of the first respondent be set aside;

(c) the liquidator of the first respondent do take immediate steps to effect a transfer and secure vacant possessions of the properties in favour of the appellants herein; and

(d) the appellants herein be given leave to commence legal proceedings

against the first respondent and/or the liquidator of the first respondent in respect of the purported sale and transfer of the properties and/or loss and damage suffered by the appellants herein.

BACKGROUND FACTS

[2] The appellants claim that they are the purchasers and owners of a total of 15 apartment units in a housing project known as 'Samaworld Parkview And Hillview Resort Apartment' in Pahang, which is later known as Amber Court. The first respondent (formerly known as Giant Bay Development Sdn Bhd) was the developer of the said housing project and Samaworld (M) Sdn Bhd ('Samaworld') was the proprietor of the land involved in the project.

[3] Some of the appellants are original purchasers who had in 1991 entered into the sale and purchase agreements with the first respondent and the proprietor while some had bought the properties from other original purchasers with the consent of the first respondent.

[4] The first respondent was wound up on 14 July 2004 and the official receiver ('OR') was appointed as the provisional liquidator. On 23 June 2005, one Sia Sien Hong was appointed as liquidator in place of the OR. Later, on 25 July 2006, one Dato' Abu Hanifah bin Noordin was appointed to replace Sia Siew Hong as liquidator. On 10 January 2013, one Gary Yong Yoon Shing ('Gary') was appointed as joint liquidator. When Dato' Abu Hanifah resigned on 17 April 2013, Gary was given the authority to continue with the affairs and administration of the first respondent.

[5] The liquidator claims that they could not find the register of owners for the Amber Court and that the complete set of documents were not kept. Hence, the liquidator had to conduct a verification exercise to ascertain ownership of the properties.

[6] Dato' Abu Hanifah had applied and obtained the said court order dated 9 December 2011 under s 233 of the Companies Act 1965, to vest in the liquidator the properties.

[7] The properties had been resold between September and December 2012 by the liquidator and the second respondent is now the registered owner of the properties except for two units which were bought and are now registered under the names of the third and fourth respondents respectively. Hence the application at the Shah Alam High Court and now the appeals before us.

DECISION OF THE HIGH COURT

[8] At the High Court, the issue whether the vesting order and the transfer to the new owners were valid had been argued and discussed. The learned JC was of the view that there was no contravention to s 233 of the Companies Act 1965 as the properties were assets of the first respondent based on the sale and purchase agreement and the fact that the strata titles were issued under its name. Therefore the liquidator, in her view, was right in taking steps to put into his custody and control of the properties and applying for the vesting order. She was satisfied that the verification exercise undertaken by the liquidator was conducted properly and according to the law without malice. Her Ladyship felt that the liquidator had acted reasonably and that more than sufficient notices, letters and advertisements had been sent out regarding the verification exercise. Her Ladyship was of the view that since there was no response from the appellants and/or their financier with the complete set of documents to prove ownership, the liquidator was not at fault in obtaining the said vesting order and in selling the properties.

[9] The learned JC was also of the opinion that the appellants had failed to take any step to protect their rights like entering a caveat and had for many years sat or slept on their rights. They therefore cannot now blame the liquidator for obtaining the vesting order and in selling the properties to the second, third and fourth respondents.

OUR DECISION

[10] Parties had submitted on various issues but it is our considered opinion that the main issue that this court needs to decide is whether the properties were the properties of the first respondent at the time when the liquidator applied for the vesting order. As shown at p 12 of the core bundle Vol 1, the notice of motion culminated in the making of the vesting order and subsequently the sale of the properties to the second to fourth respondents was clearly based on s 233 and sub-s 236(2) of the Companies Act 1965. Those sections, inter alia, read as follows:

> 233 Custody and vesting company's property
>
> (1) Where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.
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> (2) The Court may, on the application of the liquidator, by order direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving such indemnity, if any, as the Court

A directs, bring or defend any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property.

236 Powers of liquidator

(2) The liquidator may —

B (c) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;

C (3) The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise of any of those powers.

[11] Subsection 233(1) allows the liquidator to take into his custody or D under his control all the property to which the company in winding up is or appears to be entitled. Whereas sub-s 233(2) empowers the court to vest in the liquidator all or any part of the property *belonging to the company*. Hence the crux of the matter is, as stated earlier, whether the properties belonged to the first respondent then.

E

[12] The relevant parts of the judgment of the learned JC on this issue are as follows:

[30] Pencelah A telah cuba mempertikaikan hak ketuanpunyaan Responden ke atas 173 unit yang tidak dijual termasuk unit tersebut dengan pengataan bahawa F Responden adalah cuma syarikat pemaju yang telah membangunkan projek dan bukanlah tuanpunya berdaftar hartanah-hartanah di mana projek itu dibangunkan. Adalah menjadi dapatan Mahkamah ini, pengataan Pencelah adalah satu pengataan yang khilaf dan silap kefahaman. Responden sememangnya adalah tuanpunya benefisial/berkepentingan bagi unit tersebut. Ini jelas berdasarkan kepada G perjanjian jualbeli yang dimasuki oleh pembeli asal (Wong) dan Giant Bay Development Sdn Bhd. Responden dahulunya dikenali sebagai Giant Bay Development Sdn Bhd yang telah disandarkan oleh Pencelah A. Preamble perjanjian bertarikh 12.8.1991 jelas menunjukkan hak Responden seperti berikut:

PREAMBLE

H WHEREAS the Proprietor is the registered owner of all that piece of land held under Geran No. 3620 for Lot No. 10330 (formerly known as H.S.(D) No. 2022 for Lot P.T. No. 2057/45) in the Mukim and District of Bentung, State of Pahang Darul Makmur (hereinafter called 'the said Land') in area measuring approximately 673,462 square metres;

I *AND WHEREAS GIANT BAY (MALAYSIA) SDN BHD (formerly known as Techlines Corporation Sdn. Bhd.)*, a company incorporated in Malaysia and having its registered office at Wisma Sama, Lot 26 Jalan 223/51A, 46100 Petaling Jaya, Selangor Darul Ehsan (hereinafter called 'the company') is the *beneficial owner of the Apartment Land by virtue of or under the Partition*

Agreement dated the 18th day of November 1986;

AND WHEREAS the said Land is presently charged by the Proprietor to Citibank N.A., a company incorporated under the laws of the State of New York, United States of America, and having a place of business at Citibank Building, No. 28 Medan Pasar, 50050 Kuala Lumpur (hereinafter called 'the Lender') as security for loans or banking facilities granted to the Company;

AND WHEREAS the Vendor has, at its own cost and expense, obtained the approval of building plans (hereinafter called 'the Building Plan') from the Appropriate Authority (a copy of the Floor Plan, Storey Plan and Site Plan as certified by the Vendor's Architect of which are annexed hereto as The Second Schedule);

AND WHEREAS the Vendor is developing the portion of the said Land in area measuring approximately 46,583 square metres which is provisionally known as as Plot RA1, (hereinafter called 'the Apartment Land') into a housing development known as *SAMAWORLD PARKVIEW AND HILL VIEW RESORT APARTMENTS* (PANGSAPURI PERANGINAN DUNIA SAMA) complete thereon with the common facilities as in the Third Schedule hereto (Advertisement and Sale Permit No. 4772/1209/91(12);

AND WHEREAS the Proprietor and the Company have granted the Vendor the absolute right to develop and sell the Apartment Land;

AND WHEREAS the Proprietor and the Company hereby agree to the sale of the Apartment Land for the purpose if this Agreement ; ... (Penekanan oleh Mahkamah ini).

[31] Vendor di dalam perjanjian bertarikh 12.8.1991 adalah *Giant Bay Development Sdn Bhd* seperti yang dinyatakan di dalam Recital perjanjian.

AN AGREEMENT made the day and year stated the Part 1 of The First Schedule here to BETWEEN *GIANT BAY DEVELOPMENT SDN BHD*, a company incorporated in Malaysia and duly licenced under the Housing Developers (Control and Licensing) Act 1966 (Licence No. 4772/12-95/1094) with, its registered office at Wisma Sama, Lot 26 Jalan 223/51A, Petaling Jaya, Selangor Darul Ehsan (hereinafter called 'the vendor') ...

[32] Kedudukan Responden ke atas projek yang membangunkan unit-unit kondominium termasuk unit tersebut adalah lebih jelas dan nyata apabila hakmilik-hakmilik strata telah dikeluarkan oleh Majlis Perbandaran Bentong pada tahun 2005 di mana semua unit-unit yang dibangunkan di dalam projek tersebut telah didaftarkan ke atas nama Responden seperti yang dicatatkan di dalam rekod hakmilik.

REKOD KEPUNYAAN URUSNIAGA DAN PERKARA-PERKRA LAIN YANG MELIBATKAN HAKMILIK

VILLA GENTING DEVELOPMENT SDN. BHD.

Sebagai Pemegang Amanah

LOT 12.03, WISMA STEPHENS

JALAN RAJA CHULAN

50200 WILAYAH PERSEKUTUAN K.LUMPUR

[34] Maka, persoalan isu unit tersebut atau 173 unit tersebut bukan kepunyaan atau bukannya aset Responden adalah tidak timbul langsung atau tidak menjadi relevan. Justeru, apabila unit tersebut dan 172 unit lagi sememangnya aset-aset Responden semasa ia digulungkan maka ia pastinya menarik pemakaian peruntukan seksyen Seksyen 233(1) Akta. Di dalam hal ini, Pelikuidasi adalah berhak untuk mengambil kawalan dan jagaan unit tersebut.

[13] The bold words and underlines in the agreement quoted by the learned JC were made by Her Ladyship to emphasise that the properties indeed belonged to the first respondent. However with due respect, Giant Bay (M) Sdn Bhd mentioned in the preamble as 'the beneficial owner of the Apartment Land' was not the first respondent. The first respondent was Giant Bay Development Sdn Bhd, a different entity. In the agreement, the first respondent was called 'the Vendor'. The right given to the Vendor as appears on the preamble was the right 'to develop and sell the Apartment Land'.

[14] Therefore in our view, the learned JC had clearly erred when she concluded that the first respondent was the beneficial owner of the properties and that the properties were assets of the first respondent based on those wordings of the preamble to the agreement.

[15] In fact we have perused the records of appeal and we find that the fact that the first respondent was not and was never the owner of the properties but merely a developer who was given a right by the land owner ie Samaworld, to develop the lands was admitted by the first respondent in the first respondent's own affidavit affirmed on 18 October 2013 as found in para 10 at p 105 to be read with para 11 at p 112 of *rekod rayuan Bahagian* B and C for Appeal No B-02(IM)-796–05 of 2015 and the affidavit affirmed on 21 March 2010 as shown in para 14 at p 154 to be read with para 14 at p 121 *rekod rayuan Bahagian* B for Appeal No B-02(IM)-797–05 of 2015.

[16] That is not the only evidence that shows that the first respondent was not the owner of the properties. It had been pointed out to us that even the land title had an endorsement on it that the first respondent held the property as trustee: 'Villa Genting Development Sdn Bhd sebagai Pemegang Amanah'. This can clearly be seen for eg at tab 38, *Jld* 3 of the core bundle, p 974. It is not disputed that all the 15 titles have the same endorsement. Learned counsel for the first respondent argued that the first respondent did not hold the land as trustee for the purchaser but for the proprietor, Samaworld. In our view, whether the first respondent held the land as a trustee for the purchaser or as a trustee for the proprietor, the fact remains, it was not the real owner of the land.

[17] On trust property, sub-s 233(2) of the Companies Act 1965 only allows

the liquidator to vest in it properties which were held by trustee on behalf of the company and not the other way round ie the properties which the company held as trustee on behalf of others.

[18] Section 233 of the Companies Act 1965 had been discussed in *Jashin Scaffolding (M) Sdn Bhd v Chew Ai Eng Sdn Bhd; OCBC Bank (Malaysia) Bhd (applicant)* [2004] MLJU 225; [2004] 6 CLJ 497 where it was found and decided:

> The liquidator's submission seem to imply that since the liquidation of the respondent company, the liquidator is vested with the custody and control of all property of the company irrespective of whether it is encumbered or given as security to the secured creditor by the virtue of s 233(1) of the Companies Act 1965 and allegedly, the proposed creation of a charge will be usurpation of the liquidator's powers. The liquidator further submitted that the issue of whether to create the proposed charge should be left to the liquidator's discretion.
>
> Again, the court cannot accept this submission. In the present case, *the liquidator does not have a better right than the respondent company in its liquidation*. The respondent company does not have a right to demand from the applicant to hand over the said property to it until fully redeemed. Therefore, *in liquidation the liquidator is not entitled to deal with the said property. The respondent has absolutely assigned the said property to the applicant and has contracted to transfer the said property and thereafter, to create charge in favour of the applicant. The liquidator likewise should be bound by the contractual terms earlier agreed to by the respondent*. In this respect, the court refers to ss 233(1) and 277(5) of the Companies Act 1965 which provide as follows:
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> > S 233(1) Where a winding up order has been made or a provisional Liquidator has been appointed, the Liquidator or provisional Liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.
> >
> > S 277(5) The Court may require any contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the Liquidator or provisional Liquidator forthwith or within such time as the Court directs any money, property, books and papers in his hands to which the company is prima facie entitled.
>
> Section 233(1) clearly stipulate that the liquidator in dealing with company in liquidation *shall only take into his custody or control all property and things in action which the company is or appears to be entitled and in the case of s 277(5), only those property to which the company is prima facie entitled*. Again, in this respect, the court refers to the decision of the Court of Appeal in *K Balasubramaniam* case where Justice Mohd Saari Jusoh JCA, held (at p 376):
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> > The question which arises is, is the Liquidator prima facie entitled to the movable asset in the present case pursuant to s 233(1) and s 277(5)? In the light of *Director of Custom FT*'s case and *Mahadevan*'s case, *our view is that the company is not prima facie entitled to the movable asset*.

A

It is common ground that the debenture in the present case was registered under s. 108 of the Company Act 1965, meaning that the first respondent as debenture holder was a chargee of equitable charge. Assuming KCL was not in liquidation, it is incumbent upon KCL to redeem it before R&M could be compelled to hand over the movable asset to KCL. Thus, turning to the present case, *why should the liquidator's right be greater than that of KCL?* In the light of our finding in para 13 herein, R&M could not be compelled to hand over the movable asset to the liquidator. KCL is only entitled to equity of redemption and it follows, therefore, that the Liquidator is only entitled to exercise his right of redemption. (Emphasis added.)

B

C

[19] This court in a recent case of *Angkutera Sdn Bhd v Jurimba Sdn Bhd & Anor* [2016] 5 MLJ 242 had also discussed the provision of s 233 of the Companies Act 1965. In that case, the appellant entered into an agreement with the land owner, Fenghua and the developer, the second respondent, for the purchase of the basement and rooftop of a building known as Kompleks Aik Aik. The problem arose when the second respondent went into liquidation and the liquidator of the second respondent encountered difficulty in locating the documents pertaining to the assets of the second respondent. The liquidator then conducted a proof of ownership exercise and verification exercise to ascertain this fact and later on, obtained a vesting order with regard to the Cineplex, the subject matter of the said case. The appellant claimed for the ownership of the Cineplex as it was located on the rooftop but the claim was rejected by the liquidator. The Cineplex was later sold to the first respondent by the liquidator. Being dissatisfied with the action taken by the liquidator, the appellant filed summons in chambers to intervene in the winding up proceedings of the second respondent and to vary the vesting order. The trial court dismissed the application, hence the appeal to the Court of Appeal.

D

E

F

[20] At p 253 of the decision it was stated:

G

We had considered very carefully the submissions made by the parties. We agree with learned counsel for the appellants that s 233(2) of Act 125 stipulates that what shall vest in the liquidator *are only properties legally belong to the company* in liquidation. It must not be forgotten that the owner or proprietor of the land is Fenghua. The preamble of the agreement shows that Fenghua had granted Aik Aik Holdings the right to develop the land as a shopping and office complex and had agreed to the sale of the parcels units in the complex. Even the learned JC in her ground of judgment had earlier found that Fenghua had entered into a joint venture agreement with Aik Aik Holdings for the purpose of developing the land.

H

I

[21] This court in *Angkutera*, had held that the developer's interest in the land was purely monetary and it was not the owner of the land but Fenghua. Hence, the vesting order was wrong as the liquidator could only be vested with the property that belongs to the second respondent and the Cineplex did not belong to the second respondent, the company in liquidation.

[22] This court had allowed the appellant's appeal in *Angkutera*, and set aside the order of the High Court. The respondents filed an application for leave to appeal to the Federal Court and the Federal Court had recently dismissed the leave application ie on 24 October 2016.

[23] Similarly in this case we find that the first respondent was merely the developer of the housing development, Amber Court, where the properties are situated. The land onto which the properties were constructed belonged to and registered in the name of another company called Samaworld (M) Sdn Bhd. There is no evidence that the proprietor ie Samaworld had also been wound up and that its affairs were in the hands of the liquidator. Arising from that we opine there was therefore no basis for the liquidator to apply for and obtain the court order of 9 December 2011.

[24] We opine, following the English Court of Appeal in *Young v Bristol Aeroplane Company, Limited* [1944] KB 718, we are bound by the decision of this court in *Angkutera*, as far as s 233 of the Companies Act 1965 is concerned as there is no cogent reasons for us to depart from it especially when the Federal Court in *Angkutera*, had refused the application for leave to appeal. Hence, we also opine that the first respondent, being the developer of the properties, its interest in the properties was purely monetary. The liquidator was therefore wrong in applying and obtaining the vesting order to vest the properties which the first respondent did not own.

[25] As mentioned in the early part of this judgment, the properties are now registered in the names of the second, third and fourth respondents separately after the said respondents bought the properties from the liquidator of the first respondent. Learned counsel for the second, third and fourth respondents submitted that there is nothing in the National Land Code ('the NLC') which prohibits the transfer which was made by the proper registered proprietor ie the first respondent to the said respondents. He argued that sub-s 236(2)(c) of the Companies Act 1965 entitles the liquidator to sell and transfer the properties without the need for the vesting order. Even if the vesting order was liable to be set aside for contravention of sub-s 233(1), it cannot now be set aside as this would be an injustice to the second, third and fourth respondents who purchased the properties pursuant to a tender exercise and paid the full purchase price. Put in another way, an order of court cannot be set aside if third party rights will be prejudiced: *Lee Teng Siong v Lee Geok Thye Holdings Sdn Bhd* [2004] 5 MLJ 13 at p 25, para 27. Furthermore, here, the liquidator has paid out the proceeds from the sale to the first respondent's creditors. There is no way for the second, third and fourth respondents to get back their monies — to be returned to their status quo.

[26] As we have discussed earlier, the first respondent was not the proper

registered proprietor of the properties. Section 236(2)(c) of the Companies Act 1965 only allows the liquidator to sell the properties of the company. The word 'belonging' as appears in s 233 clearly denotes ownership. See *Black's Law Dictionary Deluxe* (9th Ed). The properties herein did not and do not belong to the first respondent. Hence it is quite irresistible for this court to conclude that the transfer was done through void instrument which attracts the application of s 340 of the NLC.

[27] In this regard we agree with learned counsel for the appellants' submission. The power of the court to deal with this issue stems from s 279 of the Companies Act 1965. Section 279 of the Companies Act 1965 clearly states that the winding up court may '*reverse or modify the act and/or decision of* the liquidator 'and make such order as it thinks just'. In *Law of Company Liquidation* by J O'Donovan (3rd Ed), at p 246 it is stated:

> The validity of acts done by a liquidator may be challenged on a variety grounds: it may be established that the basis on which his appointment rests is in some respect defective; or that he has exceeded his statutory powers as liquidator; or that, although acting within the scope of his powers, he has failed to obtain the necessary approval or sanction for the exercise of that power.

We also observe, in *Re Equity Funds of Australia (in Liq)* (1976–1977) 2 ACLR 238, when considering s 279 of the New South Wales Companies Act 1961, which is in pari materia with our s 279 of the Companies Act 1965, Bowen CJ said:

> The powers given to the court are to consider whether the act or decision of the liquidator was right, so that it should be confirmed, or wrong, so that it should be reversed, or partly right and partly wrong, so that it should be modified. To do this the court must have regard to the circumstances which were before the liquidator at the time of his act or decision and not to circumstances subsequently arising, subject to this qualification that in the last part of the section the court is empowered to make such order as it thinks just. This is an ancillary power to make consequential orders. I think in exercising that the power and moulding the form of order to suit the circumstances of the case, the court would be entitled to pay regard to facts and events occurring after the liquidator's decision and up to the time it was making its consequential order.

[28] As we have found earlier, the circumstances before the liquidator at the time the vesting order was applied for, was so clear, that the first respondent was not the owner of the properties. We agree with learned counsel for the appellants that the learned JC had erred, for it is trite law now that the alleged 'bona fide' of the second to fourth respondents, as immediate purchasers, is completely irrelevant and is not a bar for the setting aside of the sales and transfers made by the liquidator.

[29] The Federal Court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2

MLJ 1 had made it very clear that an immediate purchaser cannot avail itself to the *proviso to s 340(3) of the NLC*. At p 22 of the case report the court said:

> We must stress that, the fact that third respondent acquired the interest in question in good faith for value is not in issue, because once we are satisfied that the charges arose from void instruments, it automatically follows that they are liable to be set aside ...

[30] In another Federal Court case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768, the above principle enunciated in *Tan Ying Hong*, had been lucidly adopted where at para 43, Jeffrey Tan FCJ said:

> In the instant case, both the trial court and the Court of Appeal held that the fifth and sixth respondents were bona fide purchasers. But unfortunately, both the trial court and the Court of Appeal had failed to inquire whether the fifth and sixth respondents were immediate or subsequent purchasers. Only a subsequent purchaser is entitled to raise the shield of indefeasibility. *An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from Tan Ying Hong that bona fides of an immediate purchaser is not a shield to defeasibility. The defeasible title of a bona fide immediate purchaser is still liable to be set aside*. The defeasible title of a bona fide immediate purchaser only becomes infeasible when it is subsequently passed to a bona fide subsequent purchaser. That the fifth and sixth respondents were bona fide purchasers could not by facts alone gives a shield of indefeasibility ...

[31] The Federal Court was, in the recent decision in *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944, asked to decide on the following question:

> whether the title of bona fide registered owner without notice under the NLC can be defeated by a non-registered interest of an assignee/lender under an earlier sale and purchase agreement in respect of the same piece of land with other purchasers other than the first applicant.

[32] The Federal Court had answered the said question in affirmative. At para 61, the Federal Court said:

> 61. The question for determination before us brings into focus the statutory rights of a registered land proprietor/owner as conferred by the statutory provisions under s 340 of the NLC as against an equitable right of an unregistered interest of an assignee or lender under an earlier sale and purchase agreement and deed of assignment in respect of the same piece of land.

[33] After reviewing several authorities, the Federal Court said at paras 70 and 87 as follows:

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> 70. In the present case, as we have shown earlier the undisputed facts of the case clearly show that the sale and purchase agreements as well as the deeds of assignment with the earlier purchasers are valid and enforceable; and the subsequent sale and purchase agreements with the new purchasers (including the appellant) are *void ab initio* and no effect. It follows that the related transfer forms (Form 14A) must also be void and ineffective to create a registrable transfer. The agreed and undisputed facts of the case support the finding that there is sufficient evidence to show that the said Form 14A was in fact a *void instrument*.
>
> ...
>
> 87. Accordingly, for reasons already given we would answer the question posed to us in the affirmative: 'that the title of registered proprietor who was a bona fide immediate purchaser without notice under the National Land Code (Act of 1965) can be defeated by the non-registered valid equitable interest of an absolute assignee under an earlier sale and purchase agreement in respect of the same piece of land with another purchaser who was not an appellant.

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[34] We therefore agree with learned counsel for the appellant that likewise, in the present case, the second to fourth respondents clearly cannot enjoy the benefit under the *proviso to s 340(3) of the NLC*. Once the court is satisfied that the transfer of the title in the properties to the second, third and fourth respondents, being immediate purchasers, arose from a void instrument, to borrow the words of Arifin Zakaria CJ (Malaya) (as His Lordship than was) in *Tan Ying Hong*, 'it automatically follows that they are liable to be set aside'.

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[35] Although the case of *Samuel Naik*, did not involve liquidator, the principle on s 340 in our opinion, still applies.

[36] In a recent decision by the Federal Court in *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23; [2016 3 CLJ 193 a similar position had been taken by the apex court. The Chief Justice Arifin Zakaria had at p 35 (MLJ); p 205 (CLJ) said as follows:

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> [34] According to this principle, when a purchaser of a property has performed his or her contractual obligation *upon the full settlement of the purchase price* besides executing all the formal documents to effect the registration of ownership, equity accords him or her with all the rights and privileges of a legal owner over the property. *The purchaser thus enjoys the benefit of being the owner of the acquired property even though he or she has yet to become its registered owner*.
>
> [35] This is clearly demonstrated by the case of *J Raju M Kerpaya @ Jayaraman M Kerpaya*, where the Supreme Court held that:
>
> > ... the vendor of the land is only regarded as having divested himself of the beneficial interest in his land and vested it on the purchaser at the time when the purchase money had been paid in full.
>
> (See also *M&J Frozen Food Sdn Bhd & Anor* and *Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149; [1969] 1 LNS 124).

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> [36] The principle of beneficial ownership differentiate between the rights of a purchaser of a property who has fully settled the purchase price with one who has not. *This principle clothes a purchaser who has settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she has yet to be registered as the proprietor of the property.*
>
> [37] *Under this principle of beneficial ownership, the vendor becomes a bare trustee for the purchaser in respect of the transacted property, while the purchaser assumes the position of beneficial owner having right in rem over the property. The purchaser is commonly accepted as having a beneficial interest in the land on the execution of the contract and upon which specific performance may be granted by the court*. This beneficial interest is also sufficient to entitle the purchaser to enter a caveat under the NLC. (Emphasis added.)

[37] In fact, it cannot be disputed that as stated earlier, before the ex parte order was applied for or obtained by the liquidator, the strata titles of the properties issued on or about 12 May 2005 clearly show that the first respondent was merely a *trustee* ('pemegang amanah').

[38] Hence, we agree with learned counsel for the appellants that these titles themselves show that the first respondent was merely a 'bare trustee'. It matters not, whether the first respondent was a trustee for the purchasers or for the proprietor. What is important, his status remained as a trustee. Consequently, the liquidator was simply not entitled to apply for and obtain the ex parte order under s 233 of the Companies Act 1965 or to sell the properties to the second to fourth respondents under s 236 of the Companies Act 1965.

[39] Learned counsel for the appellants had pointed out to us the proof of payment of purchase price as shown in Annex A. Indeed, when the purchase price had been paid in full, the position of the liquidator of the first respondent as a bare trustee, that is, a person without beneficial interest in the property cannot be challenged. The liquidator was therefore not permitted in law to sell or transfer the properties to the new purchasers including the second to fourth respondents. See *Samuel Naik*.

[40] The learned JC had put the blame on the appellants and/or their financier for their alleged failure to lodge a private caveat on the properties. However, as decided by the Federal Court in *Samuel Naik*, the fact that there was failure on the part of the appellants to lodge a caveat does not defeat their rights, titles and interests in respect of the properties.

[41] Learned counsel for the second to fourth respondents had questioned the capacity of a winding up court to deal with the issue of void transfer. We however do not see any reason why a winding up court cannot deal with this issue of void transfer by the liquidator to the second, third and fourth

respondents; especially when it flows from the liquidator's action in administrating the so called estate of the winding up of the first respondent. Furthermore, ss 23 and 24 of the Courts of Judicature Act 1964 empower the High Court to deal in such matter.

CONCLUSION

[42] For these reasons, we unanimously allow these appeals with cost. The decisions of the High Court is therefore set aside.

Appeals allowed with costs; decisions of the High Court set aside.

Reported by Dzulqarnain Ab Fatar